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In The

Supreme Court of the United States

October Term, 1984

LA-Z-BOY CHAIR COMPANY,
Petitioner,

v.

WORLD OF SLEEP, INC.,
Respondent.

WORLD OF SLEEP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether vertically-imposed restrictions which do not entail agreement to a specific resale price or range of prices can be deemed per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether resale price maintenance arrangements should continue to be judged under the per se rule.

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WORLD OF SLEEP, INC'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

For the Court's review, a detailed statement of the facts is contained in Respondent's Cross Petition, case number 85-64. Three of the tape recordings which contained several elements of the price fixing conspiracy are set forth in their entirety in the Appendix to the Cross Petition. Respondent's abbreviated Statement of the Case in this Response to the Petition contains the facts essential to decide if the per se rule was improperly applied because a specific price was not agreed to, or to determine whether the per se concept should now be reexamined to change the law relating to resale price maintenance.

The fact simply was that there was an agreement to keep prices up: "I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up, which is illegal to even talk to him about" (Tr. III, 342; Cross Pet. App. 39a). That agreement came about after World of Sleep ran advertising which compared its low prices to Montgomery Ward's and Mauldin's [La-Z-Boy Showcase Shoppe] higher prices (Ex. 198, 202). Separate but contemporaneous World of Sleep advertising had declared a "Price War on La-Z-Boys" (Ex. 273, 275, 286). A Montgomery Ward employee in Denver sent one of the comparison ads to Montgomery Ward's home office in Chicago (Tr. VII, 973) whereupon the National Chair Buyer for Montgomery Ward asked La-Z-Boy's National Marketing

Manager, "Can't you get the guy to stop [price comparisons]" (Tr. VI, 915). The La-Z-Boy representative said he would talk to the guy and then told Montgomery Ward that World of Sleep would stop (Tr. VI, 915). After a high level meeting with Montgomery Ward about the advertising (Tr. III, 362; Cross Pet. App. 55a), La-Z-Boy told World of Sleep "I presume that you know we have your company on a credit hold now, and—you know—we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's gonna happen, and we're very sorry that any of this is happening" (Tr. III, 362; Cross Pet. App. 55a-56a).

Montgomery Ward admitted it did not want to compete with World of Sleep, could not compete with World of Sleep without hurting its profits, and in fact did not lower its prices to meet World of Sleep's low prices (Tr. VII, 983). In a year and a half of head to head competition, World of Sleep had drastically cut into Montgomery Ward's market share of La-Z-Boy sales. Its 34 percent and 39 percent share of the market in the two years before World of Sleep had dropped to 25 percent by the end of 1975. World of Sleep had captured 54 percent of the market in its first full year of selling La-Z-Boys (Ex. 35c).

La-Z-Boy offered evidence that the credit hold and its continuation was because World of Sleep did not pay its invoices on time (Tr. XIII, 2307) and further credit restrictions were imposed even after the account was paid and ready for release because it took three months to clear up the initial problem (Tr. XIII, 2320-21). World of Sleep contended it did not pay the invoices because the chairs were shipped on the wrong dates (Tr. III, 370), a problem

La-Z-Boy admitted it had with its deliveries to all dealers (Tr. III, 372; VII, 1040).

La-Z-Boy did not contend the termination of World of Sleep had anything to do with World of Sleep's failure to follow a La-Z-Boy distribution plan, or that it was because World of Sleep failed to keep its prices up or because Montgomery Ward or La-Z-Boy wanted the price comparison advertising stopped.

Petitioner's Statement of the Case contains some questionable characterizations of the facts:

1. In the first paragraph of its Statement of the Case (p. 2) it is stated that "[t]he proofs . . . demonstrated . . . that the alleged conspiracy had no direct effect on retail prices of La-Z-Boy chairs". World of Sleep's tendered evidence, eventually rejected by the trial court because Mauldin was dismissed on summary judgment, was that Mauldin raised his prices after promising to keep his prices up (Ex. 141, 141A, 352; Tr. II, 160-62). Apart from that, La-Z-Boy's statement is proof that the conspiracy was successful: Montgomery Ward did not have to lower its prices to meet World of Sleep's prices and World of Sleep's low prices were eliminated when its supply of chairs ran out.

2. La-Z-Boy twice states that Montgomery Ward's complaint had nothing to do with pricing (second full paragraph page 3; end of first paragraph page 5). However, Gene Spilo, Montgomery Ward's Denver District Merchandiser, said: "[I]nstead of competing with World of Sleep, [I] took one of their ads and sent it to Chicago" (Tr. VII, 973). He said there wasn't anything particularly wrong with the ad, just that it referred to the point

that Montgomery Ward's price was $100 higher (Tr. VII, 975-6). Montgomery Ward's National Chair Buyer Weissenstein's description of the ad was, "[t]hey took a Ward's catalog page, blew it up in the newspaper and said, here is Ward's price, and here is our price" (Tr. VI, 913).

3. "There was no evidence of any objection by Montgomery Ward or Mauldin to this [price war] advertising which featured substantial price reductions" (first full paragraph, page 4). However, the tape recordings prove otherwise: Rall (following his call to Mauldin): "I got at least 47 people beating me on the head and alongside the head and one of them is kicking me in the ass and that's Montgomery Ward". Hansen: "What have I done?" Rall: "Well you ran a little ad the other day—World of Sleep declares price war on La-Z-Boy" (Tr. III, 342; Cross Pet. App. 38a).

4. La-Z-Boy characterizes Weissenstein's request to La-Z-Boy to stop the advertising as "simple" (second full paragraph, page 4). Respondent refers the Court to the tape recording of Rall on June 23rd (Ex. 3, Cross Pet. App. 55a) to demonstrate how much coercion Montgomery Ward put on La-Z-Boy, and see paragraph 5 following.

5. La-Z-Boy doubts the veracity of its former employee, Rall (first full paragraph, p. 7), who got caught red-handed trying to fix prices (the tape recordings, Cross Pet. App. 38a-65a). It tries to paint World of Sleep in agreement with that assessment by a comment Respondent's counsel made to the Court of Appeals that Rall lied to Montgomery Ward (botton of p. 7) when he told Weissenstein, after talking with Hansen, that Han-

sen would stop the price advertising. What Respondent said in its brief was, "Instead they [Montgomery Ward] 'asked' a $12,000,000 question, 'can't you get the guy to stop?'" According to Rall he wasn't just asked, he was called in for a "command performance" where he got "kicked in the ass" and "really took a beating over there". It is no wonder he lied to Montgomery Ward when he reported back, sir, he said he wouldn't do it" (Appellant's Opening Brief p. 28).

6. La-Z-Boy emphasizes that the credit hold of May 26, 1976 came about *prior to* the advertising that "criticized" Montgomery Ward (first paragraph, p. 8). Exhibit 202 is a Rocky Mountain News ad dated March 31, 1976, and identified by Montgomery Ward as having the same content as the one that was sent to Chicago (Tr. VII, 977). A similar ad had run again the date of the first call with Rall, June 16th (Cross Pet. App. 56a), and the one sent from Denver had, at least by the time of the June 23rd call, reached Vice President Lutz's office where it was pinned to the wall (Cross Pet. App. 55a).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner's assertion that a per se violation of Section 1 of the Sherman Act is not made out because the resale price maintenance scheme did not include a reference to a specific price or a range of prices is contrary to established principles announced by this Court in *United States v. Trenton Potteries Co., United States v. Socony-Vacuum Oil Co.* and reaffirmed in *Arizona v. Maricopa County*

Medical Society. An agreement to "keep prices up" in response to a powerful retailer's invitation to the manufacturer to stop price comparison advertising by a competi tor is a retail price maintenance conspiracy condemned by the per se rule.

B. The continued applicability of the per se rule to resale price maintenance schemes may require reexamination in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.* and *Monsanto Co. v. Spray-Rite Service Corp.* However, this case does not present facts where the restraint, a credit hold to interrupt supply, was utilized for a procompetitive reason or had any procompetitive effect. Even if the manufacturer now claims that its resale price maintenance scheme was procompetitive, the reason it advanced at trial for terminating the dealer was because he didn't pay his bills on time, not because he didn't keep his prices up. Therefore, the question presented in this case is whether the termination of the dealer was in furtherance of a dealer and manufacturer marketing strategy *to maintain prices* or simply to get rid of a dealer who allegedly posed a financial risk to the manufacturer. The manufacturer's asserted reason for the termination was not due to a "distributional restraint" of the kind which permits market impact comparisons between price and nonprice restrictions.

ARGUMENT

A. Per Se Analysis Is Appropriate Whether The Resale Price Maintenance Scheme Involves Setting A Specific Price Or Not

There is little appreciable difference between Petitioner's two reasons for seeking review. In argumnt 1 Peti-

tioner asserts that where an alleged vertical restriction does not entail agreement on a specific resale price or range of prices, the restriction should be submitted to the jury under the rule of reason (Petition, 12). As a corollary to argument 1, resale price maintenance which does involve a specific price or range of prices is a per se violation. It is curious that such a slight difference in a price fixing scheme should warrant application of two very different antitrust principles. Argument 2 proposes that the per se rule is inapplicable to all vertical resale price maintenance schemes. Both arguments urge the rule of reason analysis for the price fixing conspiracy in this case.

The fine line Petitioner draws between resale price maintenance which involves a specific price and resale price maintenance that does not involve a specific price does not exist, and never has, according to this Court. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Therefore, the real purpose of La-Z-Boy's petition is to ask for reexamination of the applicability of the per se rule to all resale price maintenance as was requested by the Department of Justice in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. —, 104 S. Ct. 1464 (1984), but not there considered.

The problem with using this case as a vehicle for reviewing the per se rule is that it does not fit the sometimes difficult analysis brought about by the similarities between some price and some nonprice restraints identified in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and noted again in *Monsanto*. This case does not present a factual situation where the restraint in question can arguably be said to have been imposed because of a

market stratagem in the nature of a nonprice restraint that had an effect on price.

The thrust of Petitioner's first argument is answered in its entirety by *Arizona v. Maricopa County Medical Society, supra,* a case omitted by Petitioner in its discussion of the point it tries to make. *Maricopa* is relegated to footnote treatment as merely an example of the continued applicability of the per se rule to price agreements between competitors (Petition, 14 n. 5). Although *Maricopa* involved a horizontal price conspiracy, it is not distinguishable as to whether price fixing, vertical or horizontal, requires a specific price.

Every circuit court decision cited by Petitioner on this point, save one,[1] was decided before the decision in *Maricopa. Maricopa* did not depart from established antitrust principles, but the time span between it and *United States v. Socony-Vacuum Oil Co., supra,* which it reaffirmed, had allowed some theories to develop which permitted vertical price fixing to be considered as coming from a different mold than horizontal price fixing. *Arizona v. Maricopa County Medical Society,* 457 U.S. at 348, n. 18.

> We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 84 L.Ed. 1129 60 S. Ct. 811: 'Under the Sherman Act a combination formed for the purpose and with the effect of raising,

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[1] *Maykuth v. Adolph Coors Co.,* 690 F.2d 689 (9th Cir.) was decided October 19, 1982 and did not refer to *Maricopa.* Although Coors' specific pricing schedule was involved, the dismissal of the price fixing count was affirmed because the dealer testified he did not follow the schedule and Coors never threatened reprisals if he didn't. Other evidence confirmed that dealers set their prices independently. The question of specific versus nonspecific pricing wasn't in issue.

> depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.' 340 U.S. at 213.

Arizona v. Maricopa County Medical Society, 457 U.S. at 346-47.

Does it follow that because *Maricopa* dealt with a specific price schedule that other price fixing arrangements not dealing with specific prices are not per se violations? In *Maricopa*, the practice questioned was the establishment of a schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed. The schedule could be revised upon vote of the entire membership of the society. This Court applied to that plan, "rules that are justified in their general application". 457 U.S. at 354. Petitioner's argument that the per se concept should not apply because neither minimum nor maximum specific prices were set would permit form to control over substance, and carefully conceived price schemes could escape per se condemnation. The inherent wrong of all price fixing schemes is the agreement to fix prices, not the price or level of prices set.

The language of *Socony-Vacuum; supra* and *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), repeated by this Court in *Maricopa*, 457 U.S. at 345, is too clear to permit the finite distinction that a specific price fixing arrangement warrants per se analysis, but non-specific price fixing does not.

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the Trenton Potteries Co. Case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sher-

> man Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.

United States v. Socony-Vacuum Oil Co., 310 U.S. at 222.

In this case the exact words of one step in the price fixing consipracy were "I extracted a promise to keep prices up." "Up" meant pegged to Montgomery Ward's pricing, because that is what Montgomery Ward wanted when it "asked" La-Z-Boy, and La-Z-Boy agreed, to get World of Sleep to stop the advertising that compared World of Sleep's low prices to Montgomery Ward's high prices. Those facts, of course, do not present a carefully conceived scheme. The conspiracy was a rough product of purchasing power by a large buyer who played rough with its supplier. La-Z-Boy's Rall volunteered that he knew what he was doing was illegal when he got a promise from Mauldin. Inferentially, the knowledge of illegality was not limited to one phone call; it existed when he accepted Montgomery Ward's invitation to stop price advertising by World of Sleep, it existed when he called Hansen the first time to use the "illegal talk" on Hansen, and it existed when he left World of Sleep on credit hold until he could figure out what's gonna happen.

The Court of Appeals was correct when it reversed the trial court's refusal to give a per se instruction to govern the La-Z-Boy/Mauldin conspiracy. But it was wrong in not seeing the probative value of Montgomery Ward's "complaint" as an invitation to conspire, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and dismissed Montgomery Ward. There was shown by the totality of the circumstances[2] a "conscious commitment to a

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[2] See Respondent's Cross Petition, Sections I and II.

common scheme designed to achieve an unlawful objective" —elimination of price competition one way or another. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. at 1471.

B. Factors For Reexamination Of The Per Se Rule Are Not Presented: This Case Does Not Allow A Comparison Between Price Restraints And Nonprice Restraints. The Question Presented Below Was Whether A Dealer's Termination Was Due To Credit Problems Or Due To His Failure To Join A Conspiracy To Keep Prices Up.

At the outset of this argument Respondent notes that Petitioner La-Z-Boy did not argue for abandonment of the per se rule in the lower courts. It did mistakenly stress, as it does here, that this is a case involving a vertical nonprice restraint and therefore should be judged by the rule of reason in reliance on *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).[3] The suggestion for abandonment of the per se rule for resale price maintenance arises from the amicus position taken by the Department of Justice in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). Indeed, Petitioner's major argument is a coattailing of the Solicitor General's brief in *Monsanto* (Petition, 26-28).

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[3] Petitioner's arguments before the Court of Appeals were:

A. Vertically Imposed Non-Price Restraints Must Be Judged Under the Rule of Reason

B. World of Sleep Did Not Establish Price Fixing Subject to a Per Se Rule

C. World of Sleep Failed to Establish Any Per Se Unlawful Horizontal Conspiracy

In trying to bring this case within the class of situations discussed in *Monsanto* where the danger that the doctrines of *Sylvania* and *Colgate* could be eroded, the Petitioner has failed, like other parties and courts, to make the two distinctions which this Court has emphasized are necessary for a proper analysis of antitrust doctrines: concerted versus independent action, and concerted action to set prices versus concerted action on nonprice restrictions. 104 S. Ct. at 1469.

It is neither hard to draw the suggested distinctions in this case nor difficult to apply the doctrines to the facts. This case does not present a nonprice restriction of the nature which, if viewed either closely or from a distance, can have the same effect on the market as a price restriction. This Court in *Monsanto,* as in *GTE Sylvania,* was talking about a "particular market strategy". Justice White, in his concurring opinion in *GTE Sylvania,* referred to "distributional restraints", 433 U.S. at 70, when identifying the class of restrictions being reviewed (customer restrictions in *GTE Sylvania* and territorial restrictions in *Schwinn*). The type of nonprice vertical restrictions which should be compared with price restrictions are those "[v]ertical restrictions [which] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products". *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 54 (1977).

World of Sleep was put on credit hold and then kept there without getting chairs, according to La-Z-Boy, for credit reasons. La-Z-Boy has not suggested that the reason behind its credit hold was to limit the number of sellers to reduce intraband competition in order to promote its

interbrand competition. Nor has La-Z-Boy suggested that its credit hold had anything to do with a market strategy to compete more effectively in the ways noted by the Supreme Court in *GTE Sylvania*. 433 U.S. at 55. Instead La-Z-Boy asserts its sole reason for the interruption of supply to World of Sleep was for nonpayment of invoices.

Thus, this case is only about the first distinction noted in *Monsanto*—concerted versus independent action. Concerted action to fix prices was proved: "can't you get the guy to stop", "I'll talk to him", "he said he would"; and "I got a promise to keep prices up". Was the "plan [to] leave you right there [credit hold] until we can figure out what's gor a happen" an attempt to coerce adherence to the price fixing arrangement to "keep prices up", or was it merely independent action by La-Z-Boy to keep one of its largest independent dealers from being a "bad business risk" because of a payment dispute over admittedly poor deliveries on La-Z-Boy's part?

This is not a case which requires drawing a distinction between concerted action to set prices and concerted action on nonprice restraints. The act which La-Z-Boy calls a nonprice restraint is the continuation of a credit hold which had nothing to do with a marketing plan. The "nonprice restraint" is nonexistent.

These are not "highly ambiguous" facts. This case permits an inference that the termination was pursuant to an agreement to maintain prices. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. at 1472. The facts of this case are much stronger than those in *Monsanto* where the inference of conspiratorial termination was permitted on circumstantial evidence of an agreement on prices.

Market strategies which can be said to be procompetitive should be analyzed before the per se rule is applied to invalidate them. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50, n. 16 (1977).[4] The initial inquiry is to determine

> whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive'.

Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979).

Here, La-Z-Boy cannot even comfortably argue that its credit hold had a procompetitive effect, except to the extent that the credit hold on one independent dealer assured the continued financial viability of La-Z-Boy. However, the obvious market impact cannot be camouflaged by words: cutting off its second largest independent dealer not only eliminated that competition, it also was clearly against La-Z-Boy's economic interests.[5] It is not surprising that the evidence in this case bears out the factual premise of the statement in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 56, n. 24, "[G]enerally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, *because a lower re-*

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[4] Cited in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 80 L.Ed.2d 2, 26 (1984)

[5] La-Z-Boy states in its Petition at p. 29, "[t]here is no evidence that output was restricted". The exact opposite was proved: not only was World of Sleep deprived of its chair supply, the lack of its competition caused the entire Denver market to fall.

tail price means increased sales and higher manufacturer revenues". (Emphasis added). When World of Sleep entered the La-Z-Boy market in Denver, La-Z-Boy sales increased 72 percent.

If, however, La-Z-Boy is now taking the position that its *agreements* with Montgomery Ward and Mauldin were not a price restriction, but are nonprice restraints which have procompetitive aspects, or even if its argument is that the agreements were price restraints with procompetitive aspects,[6] a misunderstanding of the per se rule is obvious. In *Arizona v. Maricopa County Medical Society* 457 U.S. 332, 351 (1982), this Court noted:

> The respondent's principal argument is that the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

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[6] La-Z-Boy states on p. 28 " . . . La-Z-Boy's concerns and actions were entirely procompetitive in effect and purpose". There is no elucidation of the "actions". Montgomery Ward's attempt to mask its complaint about the advertising as "unethical" is, of course, mentioned in the Statement of the Case, pages 3 and 4. The statement "La-Z-Boy sought to have its dealers make enough money to stay in business and provide the ancillary services necessary for La-Z-Boy to compete effectively" is not supported by the Record. "Concerns" without accompanying actions are not actionable.

This happens to be one of those cases that presents, upon initial inquiry, a simple matter to determine whether the practice is the type of price fixing that the per se rule is meant to condemn on its face, without regard to the practice's purported justifications. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979). The facts in this case are unlike the blanket license in *Broadcast Music, Inc.* that required someone to set the price. La-Z-Boy's agreement to try to stop price advertising and to keep prices up, and failing that, to cut off World of Sleep's supply, restricted competition and decreased sales in the Denver market. The agreements were intended to be anti-competitive and they were; the defense of a credit hold had nothing to do with rendering markets more, rather than less, competitive.[7]

This case does not even present a factual situation which lends itself as an example of why resale price maintenance ought to be viewed differently than other price fixing agreements. The so-called procompetitive aspects of resale price maintainance usually come about when the price maintenance is initiated by the manufacturer.[8] The facts of this case show that it was a powerful retailer who sought the price control. That is not uncommon, nor was

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[7] The imposition of the credit hold in this case is not the same marketing practice that was condemned in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) where the elimination of credit terms once offered to all retailers was agreed to by a group of competing wholesalers.

[8] The elimination of the "free rider" is one justification. For a description of "free rider" and other economic goals for resale price maintenance see Marks and Jacobsen, *Price Fixing: An Overview*, The Antitrust Bulletin, Vol. XXX, No. 1, p. 36, n. 129.

the result unexpected that prices remained "up" and sales were down—such an effect is contrary to the market impact which the proponents for abondoning the per se rule for resale price maintenance suggest should be encouraged. Marks and Jacobson, *supra*, note 8 at 248.

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CONCLUSION

The guiding light of the Sherman Act is to preserve competition.[9] The long and arduous development of the per se and rule of reason concepts includes both the decisional process and the activity or lack of activity by Congress in the antitrust arena. Resale price maintenance has become a battleground for scholars who can foretell that some restraints imposed to benefit competitors may be necessary to achieve preservation of competition for the ultimate benefit of the consumer.[10] In balancing those apparently conflicting interests, this Court should carefully select cases for review which are likely to become keys in the evolution of antitrust doctrines. Cases selected should have facts which will permit decisions to be based on principle, not cases with "rare" facts.[11] World of Sleep submits that it is rare to capture the essence of

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9 *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1, 4-5 (1958).

10 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

11 Respondent does not suggest preclusion of review of unique cases such as *Nat'l Collegiate Athletic Ass'n v. Board of Regents of U. of Okla.*, 104 S. Ct. 2948 (1984), which involved analysis of an industry requiring restraints on competition "if the product is to be available at all". 82 L.Ed.2d at 84. Retail sales of chairs is not an industry unto itself.

a price fixing agreement on tape. Although World of Sleep would like to correct the Tenth Circuit's failure to properly use those tapes, which led it to dismiss Montgomery Ward and Mauldin, a Supreme Court review of the particularized facts of this case would only serve to distinguish it from the core of antitrust cases where conspiracies, by their nature, must be proved on circumstantial evidence.

Respondent submits Petitioner's first question presented is a make work argument to reach the substantial question of abandoning the per se rule for resale price maintenance. This is not an appropriate case for reexamination of that rule because the case does not have facts which would permit drawing a new line to distinguish resale price maintenance from other price fixing conspiracies, if the Court were inclined to do so.

Respectfully submitted,

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